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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No. 817

RAYMOND E. BEEGLE, doing business as
BEEGLE TIE SERVICE COMPANY,

Petitioner,

vs.

CHARLES M. THOMSON, as Trustee for CHI-
CAGO & NORTH WESTERN RAILWAY
COMPANY, and SHARON STEEL COR-
PORATION,

Respondents.

} On Petition for Writ
of Certiorari to the
United States Cir-
cuit Court of Ap-
peals for the Sev-
enth Circuit.

**BRIEF FOR RESPONDENTS
OPPOSING PETITION FOR WRIT OF CERTIORARI**

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The decisive questions in this case were questions of fact. These were found by the Trial Court in favor of the respondents and the Appellate Court affirmed the findings.

There is no diversity of decision in any court; no issue of fact properly reviewable in this Court; no question of law to be settled; and nothing to challenge the supervisory powers of this Court.

There is no question of general importance presented; and the instant case is not fraught with wide public interest. It is a private controversy between the parties.

The petition discloses nothing more than a desire to relitigate in this Court the merits of the issues which have been

finally and correctly determined against the petitioner, by concurrent findings of fact in the District and Appellate Courts, upon the very same contentions which are now made.

The Petition and the Brief do not present anything to justify a Writ of Certiorari upon any one of the grounds set forth in Court Rule 38-5(a) or (b). On the other hand, the statement of the case and the supporting Brief are more concerned with showing *error* below, and do not particularly point out any *actual conflict* with the decisions of this or other Courts.

A PRELIMINARY STATEMENT.

The Petition and Brief are so complicated, if not incoherent, in character, as to be very confusing and difficult to follow and in a large part wholly ignore the specific Findings of Fact of the District Court and the fact findings of the Appellate Court as expressed in its Opinion. We, therefore, feel constrained at this point to make a brief preliminary statement.

For the convenience of this Court we are printing as an Appendix hereto the Memorandum (page 32, at bottom, *infra*), and the Findings of Fact and Conclusions of Law of the District Court (page 35, *infra*), and also the Opinion of the Court of Appeals for the 7th Circuit (page 43, *infra*). The page numbers of the Record appear at the upper outside corners of the pages.

The Proceedings Below.

When Petitioner filed his amended Bill of Complaint he only charged Respondents with infringement of his patent (Count I, R. 3), but later he filed four additional amend-

ments charging Respondent* Sharon Steel with breach of contract (Count II, R. 15, 224), several acts of unfair competition (Count III, R. 15 to 18, 157), and several violations of the Anti-Trust Acts (Counts IV and V, R. 157, 158, 225, 956).

By agreement of the parties (Finding 4, *infra* 36) the cause was separated into two parts and Part 1, consisting of Counts I and II was tried in December 1941.

Before the Trial of Part 1, plenary proofs had been taken on all of the Counts before the case was separated into two parts, by the Petitioner's Depositions and Exhibits submitted by—

Herbert E. Hetu, Public Accountant, (R. 65)

Howard William Wellman, Sharon Employee, (R. 83)

George Edwin Wellman, Sharon Employee, (R. 99)

Joseph H. Jones, Sharon Employee, (R. 112)

Bertha M. Shaughnessy, (Mrs. Lloyd), (R. 46)

F. M. Gray, P.R.R. Accountant, (R. 185)

E. J. Lamneck, P.R.R. Purch. Agent, (R. 230)

A. E. Owen, P.R.R. Purch. Agent, (R. 253)

Sharon's Verified Answers to Beegle's Interrog. (R. 208)

Stipulation re Joseph H. Jones Deposition, (R. 278)

At the Trial on Part 1, the testimony of the following witnesses was taken in Open Court, for the Petitioner:

Raymond E. Beegle, Petitioner, (R. 287, 356, 473, 555)

John Foley, P.R.R. Forester, (R. 331)

*We will refer to Petitioner, Beegle, as "Petitioner", and to the Respondent, Sharon Steel Corporation, as "Sharon Steel". Respondent, Thomson, as Trustee for Chicago & North Western Railway Company, is deceased and a motion to substitute Claude A. Roth for Thomson is pending before this Court. We will refer to this Respondent as the "C. & N. W. Ry.". Emphasis ours throughout unless otherwise indicated.

Dred C. Seymour, Beegle's step-son, (R. 398)
Mrs. R. E. Beegle, wife of Beegle, E. St. Louis, (R. 400)
J. F. Cook, Jr., Beegle's patent attorney, (R. 401)
Arthur C. Buterbaugh, Sharon Salesman, (R. 416)
William J. Thomas, Sharon Salesman (R. 422)
Mason Evans, Jr., Sharon Credit Mgr., (R. 449)
Thomas M. Galbreath, Vice-Pres., Sharon Steel, (R. 465)
Walter S. Jackson, Sharon Works Manager, (R. 469)
W. E. Williams, Consulting Eng. and Pat. Atty., (R. 541)
Frank S. Dodge, Beegle's Investigator, (R. 553)

And for the Defendants:

J. M. Hughes, Ass't to Sharon Steel's President (R. 478)
Joseph Frease, Patent Counsel for Sharon Steel, (R. 481)
Raphael R. Poux, Erie R. R. Timber Inspector, (R. 491)

In connection with the foregoing *Depositions, Interrogatories, Stipulation, and Testimony Before Trial, and the Testimony at the Trial*, Plaintiff introduced in evidence *One Hundred and Two* (102) Exhibits and the Defendants introduced in evidence some *Eighty-two* (82) Exhibits; of which Exhibits the more pertinent ones were before the Courts in the consideration of *both parts of the case*.

At a Pretrial Conference, held shortly after the trial of Part 1, comprising Counts I and II, Sharon Steel filed its Motion for Summary Judgment as to Part 2, comprising Counts III, IV and V, upon the pleadings, depositions, testimony at trial of Part 1, answers to interrogatories and admissions on file (*infra* 36, 37).

Exhaustive briefs were filed by both parties on all issues (*infra* 37) and the District Court later entered its Memorandum Opinion (*infra* 32) and its Finding of Fact and Conclusions of Law (*infra* 35, 41) and at the same time the Final Judgment (R. 994) dismissing the entire complaint for want of equity and awarding costs to the defendants.

The Charges and Their Disposition Below.

Count I (R. 3) charges infringement of Petitioner's patent for "Timber Anchor" by a crinkled iron made for Respondent, C. & N. W. Ry., by Respondent, Sharon Steel. The District and Appellate Courts both held there was no infringement. The District Court on finding no infringement stated "The two irons are different in structure and different in principle and operation." (Finding 7, *infra* 37), and that the accused "iron is fully justified by the prior art" and that if the accused iron infringes, the claims in suit "are invalid for anticipation and lack of invention." (Finding 9, *infra* 38.) The Appellate Court found that "defendants more clearly adhere to the prior art and avoid the very elements which, it seems to us, led to Beegle's grant," and that "the patented device and the one accused are far from being identical or equivalent to each other in structure, design, operation or principle." (*Infra* 46, 47.)

Count II (R. 15,224) charges that Sharon Steel manufactures and sells the accused iron in violation of the 1935 "Settlement Agreement" between Petitioner and the Sharon Railway Supply Company (called "Supply Company"), under which Agreement, Supply Company settled its alleged past infringement of Petitioner's patent and agreed not to infringe in the future. With respect to these charges Petitioner alleges that Sharon Steel purchased the rights and liabilities of the Supply Company and participated in the alleged infringement for which the Supply Company settled and that, therefore, Sharon Steel is bound by the Agreement.

The District Court made specific Findings to the exact contrary (Findings 12 to 14, *infra* 38, 39). The Appellate Court specifically refers (*infra* 48, 50) to these Findings

of the District Court and found they were amply supported by the Record. The Appellate Court also held that "Defendant never agreed to refrain from manufacturing non-infringing devices," and that as there was no infringement there could be no breach of the Settlement Agreement by Sharon Steel (*infra* 47).

Count III, (R. 15 to 18, 157) charges Sharon Steel with various acts of unfair competition. Petitioner does not press the charges here, as the only reference to them in the Petition and Brief is in his three-line *Question 8*, (Petition p. 25). We will, therefore, content ourselves here with pointing out that that gist of the charges may be found in Findings 17 to 22, inclusive, (*infra* 39, 40) of the District Court. Both the District and Appellate Courts found on the merits that these charges were not sustained and also that the allegations recited no valid cause of action (*infra* 39, 40, 41, 47, 48).

Count IV has been abandoned by Petitioner (Petition p. 11). It charges (R. 157) a violation of Section 20 of the Clayton Act, which requires open bidding on railroad supplies having a value in excess of \$50,000 where the supplying company and the carrier have interlocking directors. The complaint alleged no interlocking directors between Sharon Steel and the Pennsylvania Railroad, which is specifically identified.

The District Court found (Finding 23, *infra* 40-1) that Petitioner's counsel admitted that he had not established such a relationship, and concluded as a matter of law that Count IV did "not recite a valid cause of action" (*infra* 41). The Appellate Court in like manner disposed of this Count (*infra* 48, 49).

The first charge under Count V (paragraph 18, R. 158) is also abandoned (Petition p. 11). Petitioner charges that

in the fall of 1936 Sharon Steel was in competition with the Supply Company and that in that year Sharon Steel "acquired all of the stock" of the Supply Company and dissolved that corporation and, therefore, competition between the two corporations was eliminated in violation of 15 U. S. C., Section 18.

The District Court found to the contrary (Findings 12 to 14, 25, *infra* 38, 39, 41) and the Appellate Court stated that the findings were fully supported by the evidence (*infra* 50).

The second charge under Count V (paragraph 19, R. 225) merely alleges that Sharon Steel "is attempting to monopolize and has gone a great way toward actually monopolizing the anti-splitting iron business of the United States, in violation of Section 2 of the Sherman Anti-Trust Law, 15 U. S. C., Section 2." A Bill of Particulars (R. 956) attempted to amplify this charge. As we shall show more fully later, the charge was disposed of by the courts below on the merits and also on the ground that the averments alleged no valid cause of action. (Findings 24 to 26, *infra* 41; Opinion, *infra* 50, 51.)

ARGUMENT.

“The Questions Presented” by Petitioner’s counsel are very involved and argumentative and his “Reasons Relied On” and his Argument are incoherent, disorderly and overlapping. The fundamental question of infringement, which controls the disposition of the majority of the questions, is obscured by being treated last in petitioner’s order.

We think it will be helpful to this Court if we take up the issues in consistent order as they were developed by the pleadings, presented to the Courts below and passed upon by the District Court in its Findings of Fact and Conclusions of Law and by the Appellate Court in its opinion.

At the outset of our Argument we emphasize the fact that Petitioner’s counsel has throughout the Petition and supporting Brief virtually ignored the concurrent findings of the courts below, notwithstanding the well-established rule that this Court will not disturb concurrent findings unless they are wholly unsupported by the evidence or are clearly erroneous.

This Court well summed up this rule and cited the pertinent decisions of this Court in *General Pictures Co. v. Western Electric Co.*, 304 U. S. 175, at pages 178 and 179, as follows:

“There is nothing in the lower courts’ decision on either of the added questions to warrant review here. Whether respondents acquiesced in the infringement and are estopped depends upon the facts. *Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it.* *Southern Power Co. v. N. C. Public Service Co.*, 263 U. S. 508. *United States v. Johnston*, 268 U. S. 220, 227. Moreover, the decision on that point rests on concurrent findings. They are not to be disturbed unless plainly without support. *United States v. Chemical Foundation*, 272 U. S. 1, 14.

United States v. McGowan, 290 U. S. 592. *Alabama Power Co. v. Ickes*, 302 U. S. 464. There is evidence to support them. Nor would the writ be granted to review the questions of anticipation and invention that petitioner argues, for as to them there is no conflict between decisions of circuit courts of appeals. *Layne & Bowler Corp. v. Western Well Works*, 261 U. S. 387, 393. *Keller v. Adams-Campbell Co.*, 264 U. S. 314, 319-320. Cf. *Stilz v. United States*, 269 U. S. 144, 147-148. The writ did not issue to bring up either of these questions. *Crowell v. Benson*, 285 U. S. 22, 65."

The latest expression of this Court to the same effect is found in *Goodyear Tire & Rubber Co. v. Ray-O-Vac Co.*, 64 S. Ct. 593, 594.

COUNT I.

Patent Infringement.

Re Question 6 (Pet. p. 24).

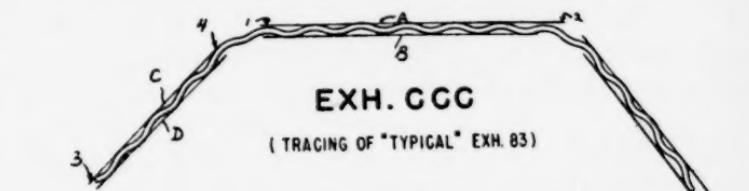
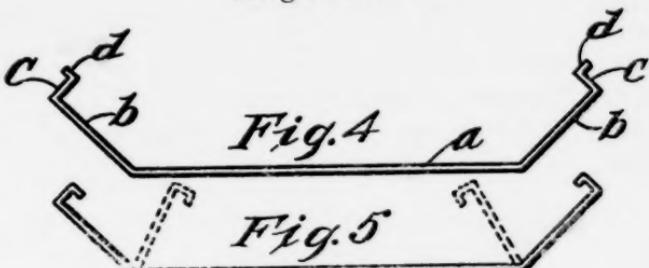
None of Petitioner's questions directly presents the naked issue of infringement. However, the argument is replete with statements pertaining directly to that issue. Indeed questions 2 to 7, inclusive, may be readily disposed of by this Court in the same manner that the issues were primarily disposed of by the Appellate Court, that is, solely on the naked issue of infringement.

The issue of infringement has been conclusively determined by the concurrent Findings of the District and Appellate Courts; and these for the most part, are not referred to or challenged by Petitioner.

In order that the Court may readily understand the application of some of the Findings to the disclosure of Petitioner's patent and to the accused device, and because the illustration of the accused device on page 18 of the Petition is *incorrect* and *fanciful*, we reproduce here Figs. 4 and 5 of

the Beegle patent, and Defendant's Exhibit CCC (R. 853). This Exhibit CCC admittedly illustrates correctly the Exhibit 83 iron which is charged to infringe (R. 512).*

Beegle Patent.



Accused Iron.

We refer this Court to Findings 5 to 9 inclusive, of the District Court (*infra* 37, 38), without quoting them here because their substance is well expressed by the Appellate Court in its opinion in part as follows (*infra* 45 to 47):

"In his application he said that his invention related to 'improvements in timber anchors,' and especially to anchors 'adapted to prevent checking and splitting of railway ties * * * with a view to preventing spike splitting, vertical checking and season checks usually existing in cross-ties and other timbers.' Obviously he did not limit his device to one adapted to be used on ties, but claimed it for anchorage or tying functions in any or all timber. Claim 1, typical, is as follows: 'A timber anchor having substantially the outline of an open-side polygon, one side of which constitutes a substan-

*The accused iron has curved crinkles and *not* the sharp bends shown in Petitioner's fanciful illustration.

tially straight body portion, an anchor face at each end thereof, constituting adjacent sides of the polygon, and each carrying a relatively short, inwardly directed terminal; said faces being shorter than said body portion and projecting therefrom at an obtuse angle, the body portion, faces and terminals of said anchor being adapted in use, to coact to define and clamp an unbroken unit of timber. *By his prescribed construction, he built on his iron, terminals 'substantially L-shaped,' teaching that thereby 'the holding power *** is increased greatly out of proportion to the amount of metal added to form this additional terminal member.'* In each claim he included this essential element, describing it in Claim 2 thus: 'Each arm carrying an inwardly directed angular member, constituting the terminals of said anchor.' Each of his illustrative figures shows this angular hook-like terminal."

"It is apparent, therefore, [from the Court's discussion of the Prior Art] that Beegle was no pioneer and, by broadly asserting an invention of an anchor device, he traveled beyond railroad tie irons into the field of similar tying devices for reinforcing joints or preventing rupture of other timber and charged himself with all he could perceive there. *His claims were allowed only after amendment to show the 'angular' terminal, or an 'angulate member at the end of each face', or 'an inwardly directed primary terminal at an extremity of said anchor.'* Evidently only because of the inclusion of this specified element, did the patent office impute invention to him. In view of the status of the art, Beegle's improvement was narrow in scope, indeed, and his claims must be limited to the precise thing he claimed. *Exhibit Supply Co. v. Ace Patents Corp., 315 U. S. 126; Barrel Fitting & Seal Corp. v. Am. Flange & Mfg. Co., 74 Fed. (2d) 569 (CCA7).*

"Did defendants infringe? Beegle's teaching as disclosed by his description and specification of terminals formed in right angles or near right angles, provided an improved anchor, resisting the withdrawing force

of the timber, not found in other devices. His underlying thought was that the anchor arms and members, when formed in such angles, provided a tying, holding power necessary to overcome the tendency of timber to pull apart. *Defendants' device includes no tying members or terminals of right angle form. It is made entirely of crinkled sheet metal and the thought underlying its construction is that the crinkles, creases or waves of the metal will furnish efficient anchorage power to overcome the tendency of the timber to spread. The only angular members are the two arms which form angles with the main body. These lack the L-hooked terminals.* It seems to us that the two conceptions are far apart in their proposed solutions of the problem. *Beegle, if he achieved invention over the prior art, did so because of the exact form which he specified. Consequently, his claims must be limited to that specified construction. On the other hand, defendants more clearly adhere to the prior art and avoid the very elements which, it seems to us, led to Beegle's grant. We think the District Court correctly held that they have not infringed. We think that the patented device and the one accused are far from being identical or equivalent to each other, in structure, design, operation or principle. Rather they represent different approaches to and different methods of solution of the problem confronting the railroad tie-iron art."*

There are many inaccurate and misleading statements throughout the Petition and Brief with respect to the patent disclosure, the accused device, and the prior art but we see no occasion for discussing these statements specifically, in view of the following admission on page 52 of the Brief which reads as follows:

"It may be that the Circuit Court of Appeals is right in concluding that, as a technical patent question, an L-hook terminal must be read into every one of the petitioner's claims. . . ."

We may say parenthetically that the limitation was not

"read into" the claims but that both the District and Appellate Courts found that the claims specifically recited Beagle's particular form of terminal which Petitioner now virtually admits is not in the accused iron.

Petitioner's Question 6 (Pet. p. 24) assumes that the Lower Courts ignored the presumption of validity of the patent in suit and found the patent invalid. That is not true. Neither court held the patent invalid though the District Court found that if the claims were infringed then the claims are invalid for anticipation and lack of invention (Finding 10, *infra* 38); and the Appellate Court found that in view of the art Petitioner's "claims must be limited to the precise thing he claimed," citing *Exhibit Supply Co. v. Ace Patents Corp.*, 315 U. S. 126.

It is perfectly manifest, we submit, that this is nothing but a simple patent case, never litigated before, in which the public is not generally interested, and in which there is no conflict with the decision of this or any other court on the issue. (*General Pictures v. Western Electric*, 304 U. S. 175, 178, 179, *supra*.)

We would point out here that the statements in Petitioner's Question 6 which are supposed to fortify the presumption of validity not only have no bearing on the issue of infringement, but are inaccurate and, in some respects, untrue. For example, there was no great commercial success as shown by the fact that the old S and C irons have always outsold and still outsell the Beagle iron (R. 350-1). It is not true that all but two competitors made "requests for licenses". A sales representative of Highland Steel merely "sounded" Beagle out as to whether he would grant a license (R. 320). National Forge "discussed" a license with Beagle (R. 319, 320). Laelete "didn't directly" ask for a license. Western Wire Products simply asked if Beagle "would not consider giving" a license (R. 320). Thomas, of Sharon Steel, who was supposed to have men-

tioned the matter of a license to Beegle, had no recollection of any such conversation (R. 439).

The Relationship of Infringement to the Settlement Agreement.

Re Questions 4, 5 and 7 (Pet. pp. 24, 25).

Petitioner has apparently abandoned the claim for relief for alleged breach of the Settlement Agreement. He invokes Count II only to support the fallacious theory, embraced within Questions 4, 5 and 7, that the test of infringement is not the patent claims but the contract. This fallacious theory is necessarily based on the assumptions that there was a *de facto* merger between Sharon Steel and the Supply Company (Question 2) or that those two companies were joint adventurers (Question 3). We will discuss these Questions 2 and 3 later and show, that they are without foundation.

The Court will note that on page 23 of the Petition Questions 2 to 6, inclusive, are submitted only, "with respect to Count I." Question 7 by its wording is also directed to Count I.

Questions 4, 5 and 7 are purely academic because there is *no* infringement and Sharon Steel could *not* have breached the covenant of the agreement not to further infringe undertaken by the Supply Company.

The finding of the Appellate Court and its discussion of authorities is so conclusive in itself on this point that we quote as follows from its opinion (*infra* 47):

"As to Count 2, admitting for the purpose of this disposition, that defendant Steel Company is bound by the contract, agreeing 'to observe and respect' the pat-

ent and not infringe it, defendant still has a right to show that it has not broken that contract, by demonstrating that nothing it has done constitutes infringement and that what it has produced is not that, or the equivalent of that which it has recognized as valid. We think the correct principles here are those controlling where a patentee has licensed another to make the patented device, concerning which, in *Sinko Tool & Mfg. Co. v. Casco Products Corporation*, 89 Fed. (2d) 916, 917, we said that 'the license raises no estoppel against the licensee in respect to the noninclusive type of his product. * * * It does not estop him in any way from making devices which are not within the class licensed, for as to such products the licensee takes nothing by the license, no immunity from suit and assumes no obligation respecting same.' *International Burr Corp. v. Wood Grinding Service*, 34 Fed. (2d) 905. *Inasmuch as defendant's device did not infringe, there is no breach of contract. Defendant never agreed to refrain from manufacturing noninfringing devices.*"

The spurious theory which Petitioner's counsel attempts to develop (Brief 46 to 54) is, assuming that Sharon Steel is bound by the Settlement Agreement, then the test of infringement, is the "thought" of the original parties to that agreement rather than the patent claims, with respect to a *later* accused iron *entirely* different from the iron involved in the agreement.

Petitioner's position is summed up in the following sentences of his Brief:

"The parties agreed that the Sharon Railway Supply Company (respondent)* was not to make a tie iron which constituted what the parties *thought* at the time of making the agreement to be an infringement,—not what a judge at some future date might decide was an infringement." (p. 50)

*The Sharon Railway Supply Company is *not* a respondent in this case.

"It's right so to do [Sharon Steel's right to contest the issue of infringement] should not depend upon 1943 concepts of infringement, but upon the criterion of infringement laid down by the parties to the Settlement Agreement." (p. 54)

Petitioner's proposition is so utterly unsound and so obviously repugnant to common sense and logic that it hardly deserves to be dignified by any discussion. He asks this Court to decide what the Supply Company "thought" back in 1935. It is well established that the question of infringement depends upon the *claims* rather than on what someone "thought". (Cases cited by Appellate Court and *McClain v. Ortmayer*, 141 U. S. 419, 424-5.)

The very absurdity of Petitioner's proposition is demonstrated by the italicized statement at the top of page 54 of the Brief that under the contract any "iron of open polygon shape," regardless of whether it had terminals or not would be an infringement in view of the Settlement Agreement, notwithstanding that the Beegle claims in suit recite terminals and notwithstanding that the District and Appellate Courts found that the accused iron and the patented iron "are far from being identical or equivalent to each other in structure, design, operation or principle." (*Infra* 37, 46, 47.)

If Petitioner's proposition is sound, then the Settlement Agreement is invalid, or at least unenforceable, as seeking to control something outside of the patent monopoly. The claims are a measure of the patent monopoly and an agreement not to make anything outside of that monopoly is clearly a violation of the law and against public policy.

In *Pope v. Gormully*, 144 U. S. 224, the parties entered into a license agreement under which the licensee was licensed to continue to operate under a certain patent and the agreement carried provisions under which the licensee

agreed to acknowledge the validity of and not infringe certain other patents under which it was not operating. The Court held the provisions illegal and against public policy.

Under Petitioner's instant proposition he would go still further and have Sharon Steel bound not to manufacture and sell something which is not covered by any patent owned by Petitioner.

Petitioner's counsel relies upon *Nachman Spring-Filled Corp. v. Kay Mfg. Co.*, 139 F. (2d) 781. In that case the Court of Appeals for the Second Circuit remanded the case to the trial court in view of the *Pope* case and *Sola Electric Co. v. Jefferson Co.*, 317 U. S. 173. Furthermore the court said that the defendant was contending for "an absurdly literal interpretation of words [of the claims] which, in ordinary usage, have a broad meaning," and that the defendant had made colorable evasions which "any mechanic skilled in the art would recognize at a glance to be obvious substitutes for those disclosed in the claims". Obviously, there the claims themselves were infringed and the *claims* were the measure of infringement as found by the Court. Here Petitioner urges that the claims are not the measure of infringement but that what the Supply Company "thought" in 1935 is the measure, notwithstanding that the Supply Company's settlement irons were just as different in structure, design, operation and principle from Sharon Steel's accused irons as are Sharon Steel's accused irons from the Petitioner's patented iron.

Throughout the Petition and Brief Petitioner's counsel entirely ignores the fact that the C. & N. W. Ry. is charged with infringement of the patent and that his complaint does not and could not charge that that Company is bound by the Settlement Agreement. Petitioner virtually admits (Pet. p. 52) that technically the lower courts were correct in finding that there is no infringement and thus he prac-

tically concedes before this Court that he had no case against the C. & N. W. Ry. Then he resorts to his fallacious theory that while the C. & N. W. Ry. does not infringe the patent claims, yet Sharon Steel is guilty of infringement because Petitioner and the Supply Company "thought" something back in 1935. The very inconsistency demonstrates the fallacy of Petitioner's "thought" test of infringement.

Obviously, Petitioner's proposition is wholly untenable, there is no authority for the same, there are authorities exactly to the contrary, and the question is of no public interest in any event.

COUNT II.

Re Questions 2 and 3 (Pet. pp. 23, 24).

Petitioner's Question 2 asks if Sharon Steel is a surviving corporation under an asserted theory of de facto merger with the Supply Company; and Question 3 asks whether Sharon Steel was a joint-adventurer with the Supply Company in view of listed presumed facts.

These questions, like Questions 4, 5 and 7, are also purely academic here because the accused iron clearly does not infringe the claims of the patent in suit, as found by the District and Appellate Courts, and virtually conceded by Petitioner's counsel, as we have shown. It is entirely immaterial whether Sharon Steel is bound by the Settlement Agreement.

We would point out however that the District Court found (*infra* 39):

"14. Sharon Steel purchased only the assets of the Supply Company and did not purchase any of the liabilities of that company. Sharon Steel did not acquire any of the stock or other securities of the Supply Com-

pany. *There was no merger of the two companies de facto or otherwise.* The Supply Company was dissolved by action of its stockholders immediately after the sale of the assets. At no time was Sharon Steel an agent of the Supply Company. There was no plan, well concocted or otherwise, by Sharon Steel to use the Supply Company as its agent or tool to infringe Beagle's patent."

The Appellate Court (*infra* 48) said as to the issues involved in Count II that:

"an examination of the evidence is convincing that it amply sustains the finding."

Not only are these findings ignored in the Petition and Brief, but Petitioner's counsel actually misstates what was found. For example, on page 39 of the Brief, he says:

"The findings and the record are indisputable that respondent Sharon Steel got *** all of the goodwill of the Sharon Railway Supply Company".

This is *not* true and the record shows it is *not* true. The very Stipulation entered into by counsel on page 143 of the record "indisputably" shows that the goodwill was not purchased, because the value of the goodwill and the cash on hand were deducted from the total assets, leaving a balance of \$10,077.45 "which is the purchase price" paid by Sharon Steel as "shown in Sharon's Exhibit 'B'".

Petitioner's counsel also states on page 41 of his Brief that "respondent Sharon Steel assumed all *known* liabilities —See Mrs. Shaughnessy's testimony, R. 50, lines 19 and 20 . . ." (Emphasis his.) This is *not* true and his Record citation does not support the statement. The Appellate Court, as did the District Court, flatly found that Sharon Steel had "assumed none of its [Supply Company's] liabilities", and the evidence fully supports this (Jones, R. 134; Evans, R. 460; Galbreath, R. 468).

None of the cases relied upon by Petitioner in his Brief on Question 2 are in any way in point. In *Commonwealth v. Merchants National*, 323 Pa. 145, "certificates of capital stock were issued in the proportions agreed upon" (p. 151). Likewise, in *Helvering v. Metropolitan Edison Co.*, 306 U. S. 522, the defendant "assumed the liability of its former subsidiaries" (p. 524) "without a valuable consideration" (p. 529). In *Metropolitan Edison v. Comm. of I. R.*, 98 F. (2d) 807, the petitioner "became liable for the debts of the absorbed subsidiaries both under the contract and by operation of law." None of these situations is present here.

A Pennsylvania case which is exactly in point is *Daily's Estate*, 323 Pa. 42, 186 Atl. 801, wherein the Supreme Court of Pennsylvania said (p. 46):

"Of course, a merger is not a sale or a liquidation of corporate property but a consolidation of property power and facilities."

Nolan v. Doyle, 338 Pa. 398, 13 Atl. (2d) 59, cited by Petitioner's counsel on Question 3 is not at all in point, as there one of the parties took a contract in his own name and supplied money to the other party for carrying out the venture.

As no applicable local decisions have been cited; *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, is not pertinent to the facts found here; and there are no conflicting decisions of this court, any Federal Court, or any Pennsylvania Court, to justify certiorari on these academic Questions 2 and 3.

We think the findings of the Courts below show that there is no basis for the assertion that there was any merger *de facto* or otherwise, or that Sharon Steel was a joint-adven-

turer with the Supply Company, so we will not review the evidence.

However, in order that this court may not be mislead by Petitioner, we feel constrained to point out further that the alleged acts of Sharon Steel as listed in Petitioner's Question 3 (Petition pp. 23-4) are wholly unfounded in the record.

There is nothing in the Record showing that Sharon Steel got the Supply Company's order in 1935 from the Pennsylvania Railroad. The evidence of six witnesses is to the contrary (R. 233-4, 255-6, 418, 420-1, 461, 469, 480).

It is not true that Sharon Steel and the Supply Company jointly submitted a crinkled "C" iron to the Pennsylvania Railroad in 1935. Sharon Steel merely supplied the crinkled steel to the Supply Company which made the irons and sold them to the Railroad (R. 152).

It is not true that Sharon Steel financed the insolvent Supply Company. Nothing but a relationship of creditor and debtor existed and Sharon Steel merely sold steel to its old customer, the Supply Company, as it did to any other customer and extended credit for the steel (R. 68, 147, 458).

And if the Supply Company did furnish Sharon Steel with tonnage lists, it could not establish the relationship of joint-adventure.

Finally, it is not true that Sharon Steel profited from the sale of tie irons by the Supply Company as implied by Petitioner's counsel. Sharon Steel merely sold the raw steel to the Supply Company, which fabricated and sold the irons on its own account. It would be perfectly absurd to say that when a steel company sells steel to its various customers it becomes a joint-adventurer with those customers.

COUNT III.

The allegations under Count III of the complaint have to do with matters of alleged unfair competition and trade.

Petitioner's Question 8 (Pet. p. 25) merely asks if these allegations "state causes of action". No further references to the allegations were made in the Petitioner's Brief other than in the conclusion to the Brief where the Petitioner states that if the Petition is granted "Petitioner would like to argue Question 8 through 11". Manifestly, this is no proper way of having this Court consider these questions on certiorari. There are specific findings as to all issues of Count III and Petitioner in no way attempts to show any error or conflict with respect to the disposition of these questions.

Section 2 of Rule 38 of this Court specifically provides that the "Petitioner shall state the reasons". Petitioner has failed to state any reason with respect to any of these questions. The reason is manifest, as the charges are as unsound and frivolous as the other charges, as will be apparent to this court by referring to the lower Court's findings, 17 to 22, inclusive (*infra* 39, 40) and the opinion of the Appellate Court (*infra* 47, 48).

COUNT IV.

Count IV charges violation of Section 20 of the Clayton Act which requires open bidding on railroad supplies where the equipment company and the carrier have interlocking directors. The charge was disproved as held by both the District and Appellate Courts (*infra* 40, 41, 48, 49) and this charge has been abandoned (Pet. p. 11).

COUNT V.

Re Question 1 (Pet. p. 22).

Count V charges Sharon Steel with two additional violations of the Anti-Trust Laws.

Paragraph 18 of Count V charges Sharon Steel with violation of Section 18 of the Clayton Act on the alleged ground that it acquired all of the capital stock of the Supply Company thus eliminating competition between the two companies. This charge, also disproved below, has likewise been abandoned by Petitioner. (Pet. pp. 11 and 34).

The only remaining charge appears in paragraphs 19 and 20 of Count V that Sharon Steel has violated Section 2 of the Sherman Act on the alleged ground that Sharon Steel "is attempting to monopolize and has gone a great way toward actually monopolizing the anti-splitting iron business of the United States." (R. 225.)

This bare averment is pretended to be amplified in a Bill of Particulars (R. 956) where it is alleged that Sharon Steel's tie iron business had increased to between 65 and 70% of the total output of the industry, and that the increase is "attributed primarily to the *discreet* use of tonnage" by Sharon Steel. Further allegations are that "it is *believed*" that Sharon Steel's Traffic Manager had written letters to railroads in Chicago calling attention to the routing of pipe and coupling equipment by an alleged subsidiary of Sharon and that a salesman of Sharon Steel shortly thereafter "called on the railroads receiving the letters".

The sole question which Petitioner expounds as to this charge of Count V is as follows:

"Question 1: Are paragraphs 17, 19 and 20 of the Complaint so indefinite that they do not state a cause

of action, and if they are, should respondent be able to take advantage of this indefiniteness by a motion for Summary Judgment?"

The charge in Count V as recited in paragraphs 17, 19 and 20 was completely and soundly determined by the District and Appellate Courts to be without foundation. Adequate and competent evidence to support the findings of the Courts below was adduced. Petitioner does not challenge or even mention these findings and his attempt to misrepresent the true basis for the disposition of the charge by a Statement that it was dismissed as too "indefinite" is illustrative of his disregard of the findings throughout the Petition and Brief.

The District Court found upon the evidence in the case, as follows (*infra* 40, 41):

"22. Sharon Steel has *not used freight tonnage* shipped over railroads as a *means* of selling anti-splitting irons. Its sales of irons are based upon the *merits* of the irons and upon *tests* and *recommendations* of the *railroad engineers*."

"23. Sharon Steel did not use its alleged large tonnage of freight as a club or otherwise to coerce purchases of anti-splitting irons from itself * * * The Court finds again that the Pennsylvania Railroad as well as other railroads purchased Sharon Steel irons on the basis of tests and recommendations of their engineering departments."

"26. Sharon Steel has not attempted to monopolize and has not gone a great way toward actually or otherwise monopolizing the anti-splitting iron business of the United States. Beegle himself admitted at the trial, and his counsel at one of the pretrial conference asserted that Sharon Steel had at least five tie iron competitors."

The District Court in its opinion stated (*infra* 34)

"Although I would not have entertained such a motion on the pleadings alone, the state of the record at the present time seems to warrant this motion. The plaintiff has taken numerous depositions pertaining to this part of the case. Certain evidence offered by the plaintiff at the trial of Part I also sheds light upon the situation confronting the Court in this motion with reference to Part II. Considering this evidence and the facts presented by the depositions on file, it is apparent that the plaintiff has no possibility of establishing the case he pleads in counts 3, 4 and 5 of his amended complaint."

The Trial Court also found (*infra* 36)

"4. Numerous pleadings were filed including Interrogatories and Answers thereto and Beegle took a number of depositions in various parts of the country with respect to all of the five counts".

The attempt of Petitioner's counsel to lead this Court to believe that the District Court disposed of Count V without any evidence on it and with the sole remark, "The plaintiff has no possibility of establishing the case he pleads in Counts 3, 4 and 5" (Pet. pp. 20, 26, 33), is *not* commendable, to say the least.

The Court's finding *inter alia* on the evidence pertaining to this issue, that Sharon had not misused its tonnage, left no issue of fact to be tried so that Sharon Steel was entitled to Summary Judgment within Rule 56(c) R.C.P., which reads in part as follows:

"there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law".

Petitioner's two authorities (Brief p. 33) do not support his position but *Toebelman v. Missouri-Kansas Pipe Line*

Co., 130 F. 2d 1016 (C. C. A. 3rd) fully supports our position as the Court said on page 1018:

"It is now well settled that summary judgment *may* be entered for either party if the *pleadings, depositions, admissions* on file and *affidavits* show that there is *no genuine issue* as to any *material fact* and that the moving party is entitled to a judgment as a matter of law."

In *Whitaker v. Coleman*, 115 F. 2d 305, C. C. A. 5th, the Court merely held that the defendant was entitled to his right to a jury trial when (p. 306) "he seasonably made his demand for a jury" which is not the situation here.

The findings of the District Court were not in any way disturbed by the Appellate Court and not being disputed nor challenged by Petitioner should not and will not, we submit, be disturbed by this Court. We submit that it is clear that this Court is fully justified in denying the Petition with respect to this charge without consideration of any further reasons.

We further point out that the Appellate Court did not dismiss this charge on the ground that the averment was "indefinite" as asserted by Petitioner's counsel in Question 1. The word "indefinite" does not appear in the Appellate Court's opinion. The Appellate Court only pointed out that Count V failed to state a cause of action because absent from it were "essential averments", also "singularly lacking" in the Bill of Particulars, the Court saying that it failed to state

"The manner, nature, character, and extent of the injury sustained and the facts from which injury accrues and upon which damages may be assessed as well as those with regard to the effect of the alleged violation upon plaintiff's business. . . ." (*Infra* 50).

and concluding that:

"Inasmuch as the count embraced no such essential averments the court properly entered judgment dismissing it.

Nor does the bill of particulars remedy this lack of averment, for it too, is singularly lacking in recital of any facts sufficient to sustain an averment of injury to plaintiff's business." (*Infra* 51).

We respectfully submit that this reason given by the Appellate Court is merely an additional reason in affirmation of the granting of the motion for Summary Judgment on the other grounds assigned. This additional reason for its allowance also warrants the dismissal as to Count V.

Assuming that Sharon Steel did call attention to a railroad that it was shipping tonnage over its line and that a salesman shortly thereafter called upon the railroad, is this unlawful? Reciprocal business dealings have never been declared by this court, or any other court, to be unlawful, so far as we know. The Appellate Court in its Opinion stated that no unlawful act was recited in the complaint in respect to this matter of tonnage and the last page of the Court's opinion (*infra* 51) fully supports the proposition that the allegation of an unlawful act is necessary according to the cases there cited.

These decisions had to do with the just stated proposition rather than with Petitioner's garbled proposition that the Court found the allegations "indefinite" as contended in pages 34 and 35 of his Brief.

The only case dealing with tonnage and cited by Petitioner is *Federal Trade Commission v. Waugh Equipment*, 15 Fed. Trade Com. Decisions, 232, 245, but Petitioner's counsel fails to point out that it arose under the "Act

to create a Federal Trade Commission" and that there were in that case positive promises or assurances of increased traffic and threats of withdrawal of traffic. There are no such averments alleged in the instant complaint.

Obviously, under the circumstances of this case, it is not believed that this Court will grant certiorari only for the purpose of remanding the case and directing the District Court to permit the petitioner to amend his pleadings. No amount of amendment could cure the fatal defects. The issue has been decided as a matter of fact on ample evidence and there is no further material issue of fact to be tried. It would be inequitable at this late date to enable the petitioner to amend and thus subject Sharon Steel to more groundless litigation. This, we submit is what the Appellate Court held when it said (*infra* 50):

"The evidence before the court, *produced by the plaintiff itself*, could reasonably lead to no other finding and the court properly, therefore, rather than enter into a long extended trial where plaintiff would be unable to prove one of its essential averments, entered summary judgment. *Abouaf v. Spreckels*, 26 Fed. Supp. 830."

We respectfully submit that the Petitioner has not brought himself within the Rules of this Court, entitling him to a Writ of Certiorari on Question 1. There is no conflict of authorities involved. The question is not of any public concern. No novel question of law is raised. The issue has already been fairly determined.

CONCLUSION.

We submit that there are no "special and important reasons" for granting the present petition, certainly none of the character of those specified in Rule 38 of this Court,

nor can we see that there is any other reason advanced that gives petitioner any standing here. We submit that the petition is wholly without merit and should be denied.

Respectfully submitted,

.....
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Received . . . copies of the foregoing brief this
day of, 1944.

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Filed
Jan. 28,
1943.

492 And afterwards on the 28th day of January, 1943,
being one of the days of the regular January term of
said court, in the record of proceedings thereof, in said
entitled cause, before the Honorable William J. Campbell
District Judge, appears the following entry:

IN THE DISTRICT COURT OF THE UNITED STATES.
* * * (Caption—2584) * * *

MEMORANDUM.

Campbell, District Judge.

In this case the plaintiff originally charged the defendants with infringement of his Patent No. 1,737,908 covering a timber anchor or iron used to prevent splitting and checking of wooden railroad ties. The defendant, Sharon Steel Corporation, is the manufacturer of an alleged infringing device and the defendant, Thomson, a user of the said device. The defendant, Sharon Steel Corporation, has assumed the defense of this cause for the defendant Thomson.

Subsequent to the filing of the original complaint, the plaintiff amended his complaint by adding counts 2, 3, 4 and 5. Count 2 charges the defendant, Sharon Steel Corporation, with breach of a contract between the plaintiff and Sharon Railway Supply Company, Inc. Count 3 charges the defendant Sharon Steel Corporation with unfair competition. Counts 4 and 5 charge the defendant Sharon Steel Corporation with violation of the Anti-trust Laws.

At the pre-trial conference held in this cause, it was, by agreement of the parties upon suggestion of the Court, stipulated that this cause would be separated into two parts. Part I to consist of counts 1 and 2, and Part II to consist of counts 3, 4 and 5. A trial of Part I was duly had and evidence and exhibits submitted and briefs and arguments filed. In Part II the defendant has since filed a motion for summary judgment upon the pleadings and record now before the Court.

With reference to Part I, I have carefully reviewed my notes of the evidence taken at the trial, the voluminous depositions, the numerous exhibits, the briefs and arguments of the parties, and the cases therein cited.

From such review I am of the opinion that the defendant's accused "special irons" do not infringe the 493 plaintiff's patent as alleged in count 1 of the amended bill of complaint. Plaintiff's patent clearly teaches a construction of tie iron having as its principal feature inwardly directed terminals constructed to readily interlock with like terminals on similar irons. In fact, this terminal development and facility of reshaping are the principal improvements of Mr. Beegle over the older type of tie irons that he used when he was engaged as a driver of tie irons in the yards of the T. J. Moss Tie Company. This teaching is not followed in the defendant's accused irons. Although it is immaterial, I cannot refrain from the observation that neither is this teaching followed by the plaintiff in the iron he is currently manufacturing and selling for commercial use. It is my opinion that although there is some similarity in the general shape of the defendant's accused iron and the plaintiff's commercial iron, neither of these irons follow the disclosures of the plaintiff's patent in suit. Thus, just as the plaintiff's iron upon which he received a patent in 1929 was an improvement over the older irons that he formerly used, his present commercial iron is undoubtedly an improvement over the iron described in his patent and likewise (depending upon the point of view of the user) so is the defendant's accused iron.

I therefore conclude that the defendant's accused irons do not infringe plaintiff's patent No. 1,737,908 in any respect, and accordingly the issues under count 1 are found for the defendants.

In count 2 of the complaint, the plaintiff alleges that a certain settlement agreement entered into between him and Sharon Railway Supply Company, Inc., on July 6, 1935, effecting a settlement of an asserted infringement of plaintiff's patent, and an acknowledgment of the validity thereof by Sharon Railway Supply Company, Inc., is binding upon the defendant Sharon Steel Corporation, and that Sharon Steel Corporation is guilty of a breach of that contract. I have carefully reviewed the many depositions taken by the plaintiff in support of this contention as well as the documentary evidence submitted by the plaintiff, and have fully considered the inferences drawn therefrom by plaintiff's counsel in his skillfully reasoned brief, but I am unable to agree with his conclusions. Although it is